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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

—against—

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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Appellants,

—against—

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Motion to Affirm

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellee moves that the final judgment and decree of the District Court be summarily affirmed without further argument on the ground that the questions urged have been so plainly foreclosed by the

decisions of this Court so as to make further argument unnecessary.

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Appellants,

—against—

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Introductory Statement

There are two questions before this Court at this time. Initially, this Court must determine whether the due process issue herein is moot and, if so, whether or not the doctrine of mootness should be invoked herein with the effect of foreclosing consideration of the substantive issue raised by this case.

When the District Court considered the issue of mootness, upon remand by this Court (with direction), it noted at that time that "the case was clearly not moot." See: July 22, 1975 Decision of the District Court (unpublished)

as set forth in Appendix "A" to Appellants' Jurisdictional Statement. While the circumtances herein have changed since that pronouncement, nevertheless the due process issue raised in this case is still viable and the doctrine of mootness should not be invoked.

After disposing of the initial question respecting mootness and depending on its resolution this Court may then have to determine whether tenured civil service employees are entitled to due process protection prior to being placed on involuntary leave of absence for up to (1) year because of alleged mental incompetence. In its initial decision, the District Court below held:

> ". . . that the Constitution requires that before involuntary leaves of absence are effectuated, which may continue for one year without pay, tenured civil service employees charged with a mental disability be granted a hearing containing the 'rudimentary due process' necessary to the accurate determination of the validity of the allegation."

See: 355 F.Supp. 764, 773 (S.D.N.Y. 1973), *vacated* 416 U.S. 977, 94 S.Ct. 2376, 40 L.Ed.2d 755 (1974).

After reconsidering this very same issue, upon remand by this Court (with direction) in light of its decision in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), the District Court held:

> "Careful consideration of *Arnett* does not require any change in this court's conclusion that the procedures challenged in this case do not comport with due process."

See: 389 F.Supp. 935 (S.D.N.Y. 1974), *vacated* 421 U.S. 982, 95 S.Ct. 1985, 44 L.Ed.2d 474 (1975).

These District Court holdings are supported by and consistent with *Arnett* v. *Kennedy, supra* and the pre-*Arnett* decisions of this Court; and, accordingly, they should be affirmed without further argument.

Statement of the Case

Appellee is a social worker who has been employed since 1965 in a permanent civil service position with the Department of Social Services of the City of New York. Section 72 (1) of the New York Civil Service Law provides that, when in the judgment of an appointing authority—an employee is not mentally fit to perform his or her duties, it may require the employee to submit to a medical examination by a medical officer selected by the state or municipal civil service authority having jurisdiction. If the examining medical officer certifies that the employee is not mentally fit to perform his or her duties, the appointing authority may place the employee on leave of absence, without pay, which may continue up to one year. If said employee is not reinstated within one year, the employee is automatically terminated. Section 72(2) and 72(3) provide, respectively, for a second examination at the request of the employee after the imposition of the initial involuntary leave of absence and thereafter for an appeal to the state or municipal civil service commission having jurisdiction. See: Appendix "C" to Appellants' Jurisdictional Statement.

Appellee's appointing officer invoked Section 72 by ordering her to appear for a "mental" examination on May 8, 1972. The examining psychiatrist concluded that the Appellee was unfit to perform the duties of her employment because of alleged mental unfitness and recommended that she be considered for an involuntary medical leave of absence. Her appointing officer accepted this recommenda-

tion and on May 10, 1972, placed her on a one year involuntary leave of absence without pay.[1]

On October 25, 1972, Appellee commenced the instant action claiming that her rights to due process and equal protection of the law were violated because she was not given an adversary hearing prior to being placed on a one year involuntary leave of absence without pay for allegedly being mentally incompetent to perform the duties of her job and because she was not provided an adequate post suspension hearing at which to contest the determination and action.

On November 30, 1972, the single district judge concluded that the question of whether due process required notice of charges and a hearing prior to the effectuation of an involuntary leave of absence, pursuant to Section 72 of the Civil Service Law of the State of New York, was a substantial one requiring the convening of a three-judge court. See: 351 F.Supp. 1360 (S.D.N.Y. 1972).

On March 13, 1973, the three-judge court declared Section 72 facially unconstitutional and enjoined the Appellants from taking any action thereunder. It held that Section 72 of the Civil Service Law of the State of New York violated the Appellee's due process rights as guaranteed under the Fourteenth Amendment to the United States Constitution. See: 355 F.Supp. 764 (S.D.N.Y. 1973).

On March 29, 1973, the Court below granted the Appellants' motion for a stay of its order pending disposition of this appeal. The stay excepted from its operation the stipulation between the Appellee and the City Defendants

[1] The facts surrounding the imposition of the involuntary leave of absence and the relevant provisions of the challenged statute are set forth in the District Court's opinion convening the three-judge panel. See: *Snead* v. *Dept. of Social Services of the City of New York*, 351 F.Supp. 1360, 1362-1364 (S.D.N.Y. 1972).

in which the latter agreed to reinstate the Appellee pursuant to the District Court's order.

On May 30, 1973, the Appellants (Civil Service Commission of the State of New York and Ersa Poston, Chairman thereof) filed a Jurisdictional Statement.

On June 8, 1973 the City Appellants filed their Jurisdictional Statement relying primarily on the statement which the State Appellants had previously submitted.

On June 29, 1973, the Appellee filed a motion to summarily affirm the District Court's decision and a brief in support thereof. On May 13, 1974, this Court vacated the judgment and remanded this case back to the District Court for further consideration in light of this Court's decision in *Arnett* v. *Kennedy, supra.* See: 416 U.S. 977, 94 S.Ct. 2376, 40 L.Ed. 2d 755 (1974).

On November 18, 1974, the District Court reaffirmed its prior decision, distinguishing *Arnett* v. *Kennedy, supra* from the instant case. See: 389 F.Supp. 935 (S.D.N.Y. 1974). On January 7, 1975, the District Court denied Appellants' motion to modify its November 18, 1974 judgment; and on February 13, 1975, the District Court denied the Appellants' motion for a stay of its judgment pending an appeal to this Court. Notice of Appeal was duly filed by the State Defendants below; and a Jurisdictional Statement was filed on March 26, 1975. The City Defendants below did not appeal this matter although they were Appellants on the initial appeal to this Court.

Simultaneous with the filing of their Statement, the Appellants sought a stay from this Court, pending the disposition of this Appeal. On April 10, 1975, Mr. Justice Blackmun denied the Appellants' Application in this regard.

On April 23, 1975, the Appellee filed a motion to summarily affirm the District Court's decision, as initially ren-

dered and subsequently reaffirmed, with a brief in support thereof.

On May 27, 1975, this Court again vacated the judgment and remanded the case back to the District Court (with direction) for consideration of the question of mootness. See: 421 U.S. 982, 95 S. Ct. 1985, 44 L. Ed. 2d 474 (1975). Then Mr. Justice Douglas would have noted probable jurisdiction and set the case down for oral argument. Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun would have affirmed the judgment of the District Court without further argument.

On July 22, 1975, the District Court issued still another decision in which it held that, as of that date, "the case is clearly not moot." See: Unpublished July 22, 1975 Decision of the District Court as set forth in Appendix "A" to Appellants' Jurisdictional Statement.

On December 4, 1975, the Appellants Civil Service Commission of the State of New York and Ersa Poston, Chairman thereof, filed a Jurisdictional Statement with this Court, Notice of Appeal having been timely given and Mr. Justice Marshall having granted the Appellants leave to docket their appeal out of time. Again the City Defendants below did not appeal this matter.

During the interim period between July 22, 1975 and December 4, 1975, the City Defendants below filed a Motion with the District Court to dismiss the complaint on the ground that the court lacked jurisdiction to grant the Appellee's claim for damages (still at that time outstanding and unpaid).

On December 10, 1975, the District Court issued another decision in which it denied the City Defendants' Motion (Circuit Judge Mulligan, as a member of the three judge district panel, writing a separate opinion in which he concurred in the result but for different reasons). See: De-

cember 10, 1975 Decision of the District Court (unpublished) as set forth in Appendix "A" hereto.

Thereafter Judgment was entered. See: Judgment as set forth in Appendix "B" hereto. The City Defendants have not appealed therefrom and they have agreed to pay said judgment.

ARGUMENT

The Due Process Issue Herein Is Not Moot and the Doctrine of Mootness Should Not Be Invoked.

The Appellants argue, in substance, that, because the Appellee has been put back to work, the due process issue herein is moot since there is no longer any grievance between the Appellee and the Appellants.

However, that position ignores the very fundamental facts that the Appellee, as a Civil Service employee, continues to be subject to the Civil Service Statute herein challenged; and that there is no assurance that the Statute will not be invoked against her, again, should the injunctive relief, herein awarded, be lifted through a vacation of the judgment below. Moreover, to assert that this possibility is speculative is to ignore the circumstances out of which this litigation grew, to wit: that an otherwise excellent employee was suddenly subjected to Section 72 of the Civil Service Act of the State of New York.

Appellants' reliance upon *Defunis* v. *Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) and *Golden* v. *Zwickler*, 394 U.S. 109, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969), therefore, is misplaced since in both instances there was *no* possibility that the Plaintiffs therein could continue to be subjected to the challenged conduct.

Thus in *Defunis, supra,* the "controversy" was closed, in toto, since, irrespective of the outcome of the litigation, Mr. Defunis was to graduate from the University of Washington Law School and could never again be subjected to its admission policies therein challenged.

On the other hand, unless the District Court's declaratory judgment is upheld, the injunctive relief attendant thereto will dissolve thereby resurrecting Section 72 and its mechanisms and once again subjecting the Appellee to such notwithstanding that, after three years of litigation and three District Court opinions, said Statute and its mechanisms have continuously and unanimously been held unconstitutional.

There are no representations which the Appellants can make which will guarantee or suggest that there is no reasonable expectation that this very same Appellee will not again be subjected to the very same statute. See: *Defunis* v. *Odegaard, supra,* where the University of Washington represented to this Court that Mr. Defunis would be allowed to graduate irrespective of the outcome of the litigation.

Moreover the reinstatement, itself, of the Appellee to her position, after the declaration of the unconstitutionality of the Statute by the District Court, does not buttress Appellants' argument that the issue herein is moot.

Early on this Court wrote in that respect:

> "Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. United States v. Trans-Missouri Freight Ass'n, 1897, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; Walling v. Helmerich & Payne, Inc., 1944, 323 U.S. 37, 65 S.Ct.

> 11, 89 L.Ed. 29; Hecht Co. v. Bowles, 1944, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754. A controversy may remain to be settled in such circumstances, United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 448, *e.g.*, a dispute over the legality of the challenged practices. Walling v. Helmerich & Payne, Inc., supra; Local 74 United Brotherhood of Carpenters, etc., v. National Labor Relations Board, 1951, 341 U.S. 707, 715, 71 S.Ct. 966, 970, 95 L.Ed. 1309. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. United States v. Trans-Missouri Freight Ass'n, supra, 166 U.S. at pages 309, 310, 17 S.Ct. 546, 547. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, National Labor Relations Board v. General Motors Corp., 2 Cir., 1950, 179 F.2d 221. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." [Footnotes omitted].

United States v. *W. T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). Moreover the Court noted that it was particularly inclined to avoid pronouncement of mootness when it is asserted as part of an effort

> ". . . to defeat injunctive relief by protestations of repentance and reform . . . and there is a probability of resumption."

United States v. *W. T. Grant Co., supra* at page 632, footnote five (5). See also: *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978 (1952).

Since the Appellants herein have never asserted "repentance and reform" insofar as Section 72 of the Civil Ser-

vice law is concerned there can be little doubt that there is not only a probability of resumption of the operation of a facially unconstitutional statute but a certainty of that to the probable detriment of many civil service employees throughout the State of New York including the Appellee herself.

In *Allee* v. *Medrano,* 416 U.S. 802, 810-811, 94 S.Ct. 2191, 40 L.Ed. 2d 566 (1974) this Court recently wrote in this respect:

> "It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants would be free to return to '. . . [their] old ways.' Gray v. Sanders, 372 US 368, 376, 9 L Ed 2d 821, 83 S Ct 801; Walling v. Helmerich & Payne, Inc. 323 US 37, 43, 89 L Ed 29, 65 S Ct 11; United States v. W. T. Grant Co. 346 US 629, 632, 97 L Ed 1303, 73 S Ct 894; NLRB v. Raytheon Co. 398 US 25, 27, 26 L Ed 2d 21, 90 S Ct. 1547; SEC v. Medical Committee for Human Rights, 404 US 403, 406, 30 L Ed 2d 560, 92 S Ct 577."

This is particularly so where, as here, the Appellants have consistently urged the validity of the challenged statute and would therefore be free to require the unencumbered use thereof were not some effective restraint made. See: *Walling* v. *Helmerick & Payne,* 323 U.S. 41, 43, 65 S.Ct. 11, 89 L.Ed. 29 (1944) where this Court wrote in this regard:

> "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. Respondent has consistently urged the validity of the [statute] and would presumably be free

> to resume the use of this illegal [statute] were not some effective restraint made. There is thus an actual controversy, and adverse interests, with a subject-matter on which the judgment of the Court can operate."

By invoking the doctrine of mootness herein, the Court is only postponing the inevitable resolution of the due process issue being raised by this litigation since that issue is "capable of repetition yet evading review." See: *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911). See also: *Defunis* v. *Odegaard, supra* at pages 318-319.

It seems almost cruel, perhaps a perversion of the doctrine of mootness, to invoke the same in order to avoid the review of the due process issue herein where there can be no doubt that the issue will be presented to the Court in the future and where there can be no doubt that the Appellee, herself, will, by the invocation of that doctrine, again be subject to the statute and the possibility of still further cruel and irreparable injury and harm thereunder.

The Decision of the Three-Judge District Court Below Is Supported by and Consistent With This Court's Decision in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) as Well as With This Court's Pre-*Arnett* Decisions Relative to the Necessity for and the Nature of Procedural Due Process.

In order to adequately discuss the propriety of the District Court's decision herein in light of *Arnett* v. *Kennedy, supra,* it is necessary to discuss, initially, the propriety of the District Court's decision in view of this Court's pre-*Arnett* decisions which address themselves to the necessity for and nature of constitutionally guaranteed procedural due process.

A. The Decision of the Three Judge District Court Below Is Supported by and Consistent With This Court's Pre-*Arnett* Pronouncement Relative to the Necessity for and Nature of Procedural Due Process.

In reading *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed2d 570 (1972) and *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), together, it is clear that this Court has enunciated a two pronged test in determining whether a due process hearing must be accorded to a public employee prior to termination. Those decisions require that, whenever an individual has an expectancy of continued employment ("property interest") or whenever the government has made a charge that would have the effect of impairing an individual's reputation or ability to obtain future employment opportunity ("liberty interest"), rudimentary due process procedures must be invoked to safeguard those constitutionally protected interests.

Combining the holding of *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), where this Court observed that a temporary deprivation of a constitutional protected interest may be just as devastating as a permanent deprivation,[2] with the holdings in *Sinderman, supra*, and *Roth, supra*, the Appellee submits that the employee, who is involuntarily placed on a one year's leave of absence without pay for alleged mental incompetence and who thereafter is subject to automatic termination at the end

[2] ". . . it is now well settled that a temporary, non-final deprivation of property is none the less a 'deprivation' in the terms of the Fourteenth Amendment . . . The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property." *Fuentes* v. *Shevin, Ibid.*

of that one year period, is entitled to due process before the effectuation of the "leave".[3]

In the instant case, the Appellee has the right to due process procedures in view of the fact that she possessed both of the constitutionally protected interests which this Court recognized in *Sinderman, supra,* and *Roth,*[4] *supra,* and in view of the fact that she was deprived of the same, for a substantial period of time, without being accorded any due process whatsoever.

There is no dispute between the parties that, since the Appellee had civil service status, she had a reasonable expectancy of continued employment in the absence of just cause for termination (a constitutionally protected "property interest").

Moreover, the Court below held that, because the Appellee had been found to be mentally unfit and would, accordingly, be impaired in her ability to attain future employment opportunity, she also had a constitutionally protected "liberty interest" under the rationale enunciated in *Roth, supra.*

Accordingly, in view of the fact that the Appellee possessed both a constitutionally protected "property interest" and a constitutionally protected "liberty interest," she was entitled to rudimentary due process procedures before the effectuation of a governmental action adverse to those interests.

[3] The statute pursuant to which the Appellee was placed on an involuntary leave of absence for one year also provides that, after one year, the employee may be unilaterally terminated. See: Section 72 of the Civil Service Law, Paragraph 4.

[4] In *Roth* this Court re-affirmed a position which it took in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 510, 27 L.Ed. 2d 515 (1971).

Having applied *Perry* v. *Sinderman, supra,* and *Board of Regents* v. *Roth, supra,* and the authorities cited therein, and having found that the Appellee possessed constitutional interests thereunder requiring rudimentary due process procedures and protections before a governmental action adverse to the same can be taken, the Court below then addressed itself to the question of whether Section 72 of the Civil Service Law of New York, in fact, accords an individual satisfactory due process. It concluded that Section 72 did not provide constitutionally satisfactory procedures.

Section 72 authorizes Civil Service employers to place employees who have permanent Civil Service status on an involuntary leave of absence for up to one year, without pay, upon certification by a physician designated by the employer that the employee is mentally unfit to perform his or her duties. Section 72 does not provide for an adversary hearing, representation by counsel, adequate and timely notice of the charges or an opportunity to confront adverse witnesses and/or evidence.[5]

The Court below did not prescribe the precise form the hearing must take, following this Court's direction in this regard; but it did hold that the Appellants must conduct an adversarial proceeding. In so doing, the Court below relied on *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1101, 25 L.Ed.2d 287 (1970) which defined rudimentary due process procedures as those requiring a timely and adequate notice

[5] The Court below did not reach the Appellee's Equal Protection argument wherein she contended that there was no rational basis for differentiating between the procedures provided in Section 75 of said law, for removing an individual accused of alleged misconduct or suffering from an alleged physical infirmity, and those provided by Section 72, for removing an employee suffering from an alleged mental infirmity. The former provides extensive due process protection whereas the latter does not. See: Appendix "C" hereto.

of the nature of the charges and an effective opportunity to defend the charges or accusations by confronting adverse witnesses, by presenting one's own evidence and by presenting oral arguments before an impartial decision maker with the right to be represented by retained counsel.

The Court below rejected the argument that an ex parte examination by a neutral doctor is the kind of notice and hearing that is likely to establish the validity of the allegation in question. See: *Fuentes* v. *Shevin, supra;* and *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). The Court below stated in this regard:

> "Unless doctors are deemed to possess an omniscience which our legal system refuses to attribute to the most experienced judges, they cannot be expected to make fair and accurate factual determinations under such circumstances. Even to the extent that the ultimate determination of mental fitness depends upon the judgment of a doctor based exclusively on his observations of the employee at the examination, fairness requires that the employee have an opportunity to challenge the doctor's conclusions and present his own medical evidence. *Our jurisprudence does not recognize the opinion of any individual expert as infallible; professional judgments concerning mental fitness are just as likely to differ as the observations of laymen regarding simple issues of fact.*" (Emphasis added). 355 F.Supp. 764, 772.

Furthermore, the District Court rejected the argument that the appeal procedures provided for in Section 72 were adequate enough to satisfy rudimentary due process inasmuch as those procedures were couched in discretionary language and placed the burden of proof on the employee to establish that the initial determination of mental incompe-

tence was not arbitrary or unreasonable. Such an appeal procedure was not considered to be an adequate substitute for a fair hearing prior to the action and decision adverse to the constitutionally protected interests.[6]

Recognizing the importance of the state interest in assuring that the state function is carried out effectively and efficiently by competent employees, the Court below appropriately declined to prescribe the exact nature of the due process procedures it mandated other than to require that such procedures be adversarial in nature and consistent with this Court's guidelines, as enunciated in *Goldberg* v. *Kelly, supra,* in order to assure that "the hearing contain 'rudimentary due process' necessary to the accurate determination of the validity of the allegation." [7]

The Court below further stipulated that, except "under exceptional circumstances requiring immediate action", the hearing must be given prior to the placement of the employee on an involuntary leave of absence.[8] *Fuentes* v. *Shevin, supra; Bell* v. *Burson, supra.*[9]

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[6] Since the examination by the medical officer is not required to be transcribed, it would seem difficult to demonstrate that the determination was arbitrary or unreasonable. Again compare Section 75 which provides for a transcription of the hearing.

[7] Relying on *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967) the Court below rejected Appellants' argument that the due process requirement should be less stringent because the legislative motives were benevolent in nature. In that regard, this Court stated:

> ". . . Unbridled discretion, however benevolenty motivated, is frequently a poor substitute for principle and procedure."

In re Gault, Ibid. See: Decision of the Court below at 355 F. Supp. 764, 773 (S.D.N.Y. 1973).

[8] Compare Section 75 of the Civil Service Law which provides for a prior hearing.

[9] See also: *Goldberg* v. *Kelly, supra,* where this Court held that a prior hearing was necessary even though a subsequent *hearing* was afforded; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969) where this Court held that a prior hearing was necessary even though a subsequent *trial* was accorded; *Boddie* v. *Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971); *Wisconsin* v. *Constantineau, supra.*

The foregoing discussion substantiates the holding of the Court below that, under pre-*Arnett* decisions of this Court, the Appellee was entitled to a due process hearing prior to the action taken against her by the government relative to her employment status, inasmuch as she possessed interests in property and liberty of constitutional dimensions; and that the procedures provided for in Section 72 of the New York Civil Service Law do not provide "the kinds of notice and hearing that are likely to establish the validity of the deprivation in question" so as "to assure that a finding of mental unfitness will be a fair and accurate one." See: Decision of the Court below at 355 F. Supp. 764, 772 (S.D.N.Y. 1973).

Moreover, after further consideration of the issues herein upon remand by this Court in light of its decision in *Arnett* v. *Kennedy, supra,* the District Court was totally justified in concluding that *Arnett* did not require it to change its initial conclusion that the Appellee possessed constitutionally protected interests; and that the procedures challenged herein do not comport with rudimentary due process.

B. The Decision of the Three District Judge Court Below Is Supported by and Consistent With This Court's Pronouncement in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974) Relative to the Necessity for and Nature of Procedural Due Process.

In *Arnett, supra* the basic question was whether a tenured employee's termination, pursuant to the Lloyd-La Follette Act (5 U.S.C. §7501) and its attendant regulations, complied with constitutional due process requirements under the Fifth Amendment, as those requirements have been enunciated by recent decisions of this Court. That basic issue was subdivided by this Court in the following way:

a. Is such an employee protected by the Due Process Clause of the United States Constitution and this Court's decisions interpreting the same, when the federal statute, though specifically granting the employee a property right in his job, specifically defines and limits the due process protection to be accorded to such an employee?

b. In balancing the interests of the government against the interests of the individual employee, do the safeguards embodied in the act and its attendant regulations satisfy minimal due process requirements?

Among the six justices of this Court who held the statutory procedures in the Lloyd-LaFollette Act must be measured by constitutional due process standards and cannot be self-defining,[10] four (Mr. Justice White, Mr. Justice

[10] See: *Watson* v. *Branch County Bank*, 380 F.Supp. 945, 964 (W.D. Mich. 1974) where Chief Judge Fox, in interpreting *Arnett, supra,* stated:

"In more recent cases, the Supreme Court has been closely exploring the limits of the due process guarantee. A majority of the Court has rejected the view that a statutorily created property right can be conditioned on a statutory limitation of procedural due process protections. Rather, once the right exists, the procedures established for its impairment or deprivation must meet constitutional standards. *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (April 16, 1974)."

See also: *Janis* v. *Wilson*, 521 F.2d 724, 729 at footnote 9 (8th Cir. 1975).

Brennan, Mr. Justice Douglas and Mr. Justice Marshall) found the statutory due process provisions constitutionally defective; while only two (Mr. Justice Blackmun and Mr. Justice Powell) found the statutory due process provisions constitutionally acceptable. However, when the latter two were joined with Mr. Chief Justice Berger, Mr. Justice Rehnquist and Mr. Justice Stewart, who accepted the statutory limitations attached to the constitutionally recognized property and liberty interests, it provided a majority for the result arrived at in *Arnett, supra.* In applying *Arnett, supra,* to the instant case, it is necessary to analyze the reasoning of each justice of this Court in order to understand how the District Court herein arrived at its decision, on remand.

Since the majority of the Court answered question (a) above in the affirmative (6-3), with the three justices who responded negatively to question (a) never addressing themselves to question (b) above, the issue in this case must be formulated in light of the six justices who addressed themselves to the second question in *Arnett, supra,* to wit: in balancing the interest of the public employer in discharging unsatisfactory employees with the interest of the employee in continued employement, do the safeguards encompassed within the legislation satisfy minimal due process requirements? Appellee submits that, in view of *Arnett,* the answer lies in comparing the due process protections embodied within 5 U.S.C. §7501 (the Lloyd LaFollette Act) and its attendant regulations—with the due process protections of Section 72 of the Civil Service Law of the State of New York, which the Court below correctly held was facially unconstitutional.

The federal statute, and its attendant regulations, provide the following protection to the employee prior to effecting any adverse action:

1. Notice of the charges preferred against the employee.
2. A copy of the charges.
3. A reasonable time for filing a written answer to the charges.
4. A written decision on the answer at an early, practicable date.
5. Thirty-days advance written notice prior to removal.
6. An opportunity for the employee to appear before the official who is charged with the authority to remove him or her.
7. Notice of the adverse decision, prior to its effective date.
8. Notice of a right to appeal from an adverse decision.
9. A full evidentiary, trial-type hearing at the appeal stage of the proceeding.

In contrast to the above protections initially afforded to an affected employee under the federal statute in ***Arnett, supra,*** the only procedural safeguards initially afforded to the Appellee herein, under Section 72 of the Civil Service Law of the State of New York, was a written statement of the reason for her suspension. Section 72 *does not incorporate any of the safeguards enumerated above under the Lloyd-La Follette Act;* and for that matter has virtually no safeguards whatsoever.

Most importantly, Section 72 does not require a trial-type evidentiary hearing at the appeal stage of the proceeding, as did the Lloyd-La Follette Act in ***Arnett, supra.***

Moreover, under Section 72, at the second stage of appeal the Appellee is required to assume the burden of proof to show that the ex parte determination of the medical officer was arbitrary or unreasonable. If she is unable to meet this burden of proof within one year after her suspension, she is automatically terminated.

Of significance in ***Arnett*** is that two of the Justices, who joined in the result but who did so only after examining the statute along constitutional standards, found that the existence of the main thrust of the statutory procedures, after the fact rather than before the fact of discharge, was constitutionally acceptable only because in ***Arnett*** the employee failed to show an infringement upon a constitutionally protected "liberty interest."

In the instant case, the Court below held that the charge of mental incompetence, which attached to the Appellee, possessed:

> ". . . a substantially greater threat to her liberty and property—as measured by potential lasting harm to reputation and employability caused by an initial adverse determination [footnote omitted]—than was the plaintiff in ***Arnett.***" [11]

See: 389 F.Supp. 935, 937 (S.D.N.Y. 1974).

The District Court went on to say that:

> "Since an initial adverse determination is likely to produce more substantial harm to reputation and employability in this case than in ***Arnett,*** and since that harm is less easily eliminated by a subsequent vindication in this case than in ***Arnett,*** due process requires the ob-

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[11] The footnote omitted alluded to ***Roth, supra*** at pages 572-574. For a discussion in this regard, herein, see argument "A" ***supra.***

servance here of more adequate safeguards against an incorrect initial determination. We therefore reaffirm our conclusion that absent exceptional circumstances a prior adversarial hearing must be held, the precise form of which, as we previously noted, we do not prescribe but leave to the State to meet the test of 'rudimentary due process.'" *Ibid.*

Appellee submits that the combination of the absence of rudimentary procedures in Section 72 of the Civil Service Law of the State of New York, as compared to the relatively comprehensive safeguards in the federal statute in *Arnett, supra,* and the fact that the action of the Appellants herein affected both the Appellee's constitutionally protected "property interest" and her constitutionally protected "liberty interest", as contrasted to the fact that, in *Arnett,* the action therein affected only the employee's constitutionally protected "property interest", left the District Court no other option but to conclude that, based on a comprehensive analysis of each of the Justices' positions in *Arnett, supra,* all of the Justices of this Court would find Section 72 of the Civil Service Law of the State of New York constitutionally defective; and, accordingly left the District Court no other alternative but to reaffirm its previous decision in this matter in view of its consistency with both *Arnett, supra,* and the pre-*Arnett* decisions of this Court.

CONCLUSION

This Court should decline to invoke the doctrine of mootness. Furthermore, in view of *Arnett* v. *Kennedy, supra,* and the pre-*Arnett* decisions of this Court as heretofore discussed, this Court should summarily affirm the decision of the District Court below since the questions

presented are so wanting in substance as not to need further argument.

Date: New York, New York
February 28, 1975

Respectfully submitted,

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Certificate of Service

Nathaniel R. Jones, one of the attorneys for the Appellee, certifies that on the 26th day of February, 1976, I did serve three copies of the foregoing Motion to Affirm and the Brief in Support thereof, upon the attorneys for the Appellants by mailing the same, first-class, postage prepaid to them as follows: Office of the Attorney General, State of New York, Two World Trade Center, New York, New York 10047 Attention: Ms. Lillian Cohen, Assistant Attorney General.

Dated: New York, New York
February 28, 1975

Respectfully submitted,

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APPENDICES

Appendix "A"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILED

Dec 10 1975

S.D. of N. Y.

72 Civil 4536

OPINION

43513

MARIE SNEAD,

Plaintiff,

—against—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, a governmental agency, JULES SUGARMAN, in his official capacity as Commissioner of the Department of Social Services of the City of New York, INES MONTEVERDE, in her official capacity as a Supervisor in the Department of Social Services of the City of New York, CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, a governmental agency, HARRY L. BRONSTEIN, in his official capacity as Chairman of the Civil Service Commission of the City of New York, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERTHA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Defendants.

Appendix "A"

Before:

MULLIGAN, *Circuit Judge,* and
WEINFELD and BRYAN, *District Judges.*

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EDWARD WEINFELD, *D. J.*

This belated motion by the City of New York defendants to dismiss the complaint on the ground that the court lacks jurisdiction to grant plaintiff's claim for damages requires a brief history of this litigation, now approaching its fourth year, in which time the case has been before the Supreme Court twice without a final determination on the merits.

Appendix "A"

Plaintiff, a Civil Service social worker in the employ of New York City's Department of Social Services, was placed on involuntary leave without a hearing. She commenced this action on October 25, 1972, upon a claim that section 72 of the New York Civil Service Law, which governs leaves of absence for mentally unfit Civil Service employees, was unconstitutional. She moved for (1) the convening of a three-judge court, and, pending the final determination of the merits by the panel, (2) a preliminary injunction and a temporary restraining order directing defendants to reinstate plaintiff with back pay. Jurisdiction was predicated upon 28 U.S.C., sections 1331, 1343(3) and 1343(4) and 42 U.S.C., section 1983.

The defendants cross-moved to dismiss the complaint pursuant to Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure on the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief may be granted. The motion to convene a three-judge court was granted, but the motion for temporary injunctive relief directing her reinstatement with back pay was denied.[1]

Thereafter, the defendants argued before the three-judge court for dismissal of the action upon the grounds (1) that the statute comported with due process requirements, (2) that plaintiff failed to exhaust administrative remedies, and (3) that this court should abstain from a determination on the merits in order to afford the state courts an opportunity to construe section 72 to meet plaintiff's constitutional challenge. The three-judge court rejected the defendants' contentions, declared section 72 of the New York Civil Service Law unconstitutional, en-

[1] Snead v. Department of Social Services, 351 F. Supp. 1360 (S.D.N.Y. 1972).

joined defendants from taking any action thereunder, and ordered that plaintiff be reinstated with back pay for the period of her involuntary leave of absence.[2]

Upon appeal, the Supreme Court vacated the judgment and remanded the case for further consideration of the due process issue in the light of its decision in *Arnett* v. *Kennedy*.[3] After hearing further argument following the remand, this court, holding that there were critical differences between *Arnett* and this case, adhered to its prior ruling that the New York statute did not comply with due process requirements.[4] Upon defendants' appeal from this determination, the Supreme Court again vacated the judgment, this time remanding the case to the three-judge court for consideration of the question of mootness.[5] While the Supreme Court did not identify the mootness issue, evidently its remand was based upon the fact that plaintiff had been reinstated to her former position. The three-judge court, upon this second remand, heard argument and determined on July 22, 1975 that the action was not moot since plaintiff's original prayer for relief, in addition to seeking a declaration that section 72 was unconstitutional also sought reinstatement to her former position with back pay.[6] Although plaintiff had been reinstated, the "City stubbornly refuse[d] to give her back pay," which had been directed by the three-judge court in its original disposition

[2] Snead v. Department of Social Services, 355 F. Supp. 764 (S.D.N.Y. 1973).

[3] 416 U.S. 977 (1974).

[4] Snead v. Department of Social Services, 389 F. Supp. 935 (S.D.N.Y. 1974).

[5] 421 U.S. 982 (1975).

[6] Snead v. Department of Social Services, Civil No. 72-4536 (S.D.N.Y., July 22, 1975).

in March 1973. Accordingly, the three-judge court held that plaintiff was entitled to judgment awarding her back pay.

Up to this point in the litigation, the defendants in the various challenges to plaintiff's claims for relief never made any contention as to lack of jurisdiction or failure to state a claim with respect to the demand for back pay. Following the three-judge court's latest ruling that the action was not moot, the plaintiff in August 1975 proposed a judgment which, among other matters, declared the state statute unconstitutional, directed plaintiff's reinstatement (which already was in effect), adjudged plaintiff entitled to recover $12,630 in back pay from the municipal defendants, and awarded her sick leave and vacation benefits of which she had been deprived during her involuntary leave of absence. After a delay occasioned by dilatory tactics of the Corporation Counsel assistants, during which they failed to object or consent to the form of the proposed judgment, plaintiff's counsel was forced to move for the entry of a formal judgment to effectuate this court's ruling. Then, for the first time during the entire course of this litigation, the municipal defendants raised the issue of lack of jurisdiction with respect to the plaintiff's claim for back pay. In opposing plaintiff's motion for entry of judgment, they renewed an earlier motion to dismiss the complaint denied almost three years ago, now moving to dismiss pursuant to Rules 12(b)(6) and 12(h)(3) on the new "grounds that the Court lacks jurisdiction to grant plaintiff's claim for damages." Essentially they urge, in reliance upon *City of Kenosha* v. *Bruno*[7] and *Monroe* v. *Pape*,[8] that

[7] 412 U.S. 507 (1973).

[8] 365 U.S. 167 (1961).

municipalities may not be held liable for equitable relief or damages in an action for violation of civil rights under 42 U.S.C., section 1983, and hence the court was without jurisdiction over such a claim under 28 U.S.C., section 1343. But accepting the principle of non-liability of the municipal defendants under those provisions does not resolve the question now presented in this case, which from its inception has generated its own facts.

Preliminarily, it is observed that this is not a civil rights class action. While plaintiff asserted a claim under the Civil Rights Act, 42 U.S.C., section 1983, and with respect thereto alleged jurisdiction under 28 U.S.C., sections 1343(3) and (4), she did not confine her claim or jurisdiction to those provisions. Plaintiff, aggrieved by her suspension as a Civil Service employee, charged that the state statute was void for denial of her right to due process under the Fourteenth Amendment. Specifically, she alleged that the action was one "seeking redress for the deprivation of [her] constitutional and civil rights, the matter in controversy exceeding the value of $10,000, exclusive of interest and costs." Thus, in this aspect of her case, she squarely grounded jurisdiction on section 1331(a), which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Since plaintiff alleged a deprivation of her constitutional rights and her damage claim was in excess of $10,000, there can be no doubt that the court had "federal question" jurisdiction of her claim under that section.

Defendants' position is that plaintiff having been awarded a judgment declaring section 72 unconstitutional and having been reinstated to her job, the court had thereby exhausted its jurisdiction and had no subject matter jurisdiction over the back wage aspect of her claim, since it was not one "arising under" the Constitution or laws of the United States. This effort to truncate the court's jurisdiction with respect to the back pay claim after judgment in plaintiff's favor must fail.

The municipal defendants' challenge to an award of damages is that Congress did not expressly grant the district court power to hear such a cause of action premised directly upon the Fourteenth Amendment. The argument proceeds further that Congress affirmatively created such a cause of action to enforce the Fourteenth Amendment when it passed the Civil Rights Act of 1871 (now 42 U.S.C., section 1983), and since it created no other right of action predicated directly on the Fourteenth Amendment there is no jurisdiction under section 1331—in sum, absent an express congressional authorization to award damages for a violation of Fourteenth Amendment rights, the courts lack jurisdiction to make such an award.

This argument blurs the distinction between subject matter jurisdiction and failure to state a claim. It runs directly afoul of the principles announced in *Bell* v. *Hood*.[9] There plaintiffs sought damages for alleged violations of their rights under the Fourth and Fifth Amendments and asserted jurisdiction under 28 U.S.C., section 41(1), the predecessor of section 1331. The district court dismissed the action, and the Court of Appeals affirmed[10] on the

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[9] 327 U.S. 678 (1946).

[10] 150 F.2d 96 (9th Cir. 1945).

ground it was not one that arose "under the Constitution or laws of the United States . . . ," as required by 28 U.S.C., section 41(1), and the court therefore lacked subject matter jurisdiction. The Supreme Court reversed, holding:

> "[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit.
>
> . . . .
>
> "Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.
>
> . . . .
>
> "[T]he right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." [11]

[11] 327 U.S. at 681-82, 685.

This holding was reaffirmed in *Wheeldin* v. *Wheeler*,[12] and recently adopted by the Second Circuit in a case cited by the parties which considered but did not pass upon the very question raised here—whether there is an implied right to damages under the Fourteenth Amendment.[13]

The defendants' reliance upon *City of Kenosha* v. *Bruno*,[14] the Supreme Court's latest ruling which recognized that a municipality is immune from a claim under the Civil Rights Act and consequently that the Court lacks jurisdiction under section 1343, is misplaced. It is significant that the majority remanded the case to the district court to consider the availability of section 1331 jurisdiction, which had been alleged but not passed upon by the court below. Additionally, Mr. Justice Brennan, in his concurrence, joined in by Mr. Justice Marshall, stated:

[12] 373 U.S. 647, 649 (1963).

[13] *See* Brault v. Town of Milton, Dkt. No. 74-2370 (2d Cir., Oct. 1, 1975) (en banc), slip. op. at 6278 n.1:

> "Federal jurisdiction is invoked under 28 U.S.C. § 1331, the complaint alleging that the amount in controversy exceeds $10,000. Since plaintiffs have drawn their complaint so as to seek recovery under the Constitution and laws of the United States, this court has jurisdiction to hear the case, even if the complaint ultimately fails to state a claim. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)."

The majority of the en banc panel in *Brault* held that the plaintiffs did not establish that their Fourteenth Amendment rights had been violated, and therefore did not have to decide whether such a violation would give rise to a damage claim. It is interesting to note that in Fisher v. City of New York, 312 F.2d 890 (2d Cir. 1963), the Second Circuit had held that there was no implied right to damages under the Fourteenth Amendment. The basis for the dismissal of the action, however, was not lack of subject matter jurisdiction, but failure to state a claim upon which relief could be granted. *See also* Dexter v. Equitable Life Assur. Soc'y, Dkt. No. 75-7427 (2d Cir., Nov. 18, 1975).

[14] 412 U.S. 507 (1973).

"If appellees can prove their allegation that at least $10,000 is in controversy, then section 1331 jurisdiction is available, *Bell* v. *Hood,* 327 U.S. 678 (1946); cf. *Bivens* v. *Six Fed. Narcotics Agents,* 403 U.S. 388 (1971) . . . ." [15]

Plaintiff's claim was in excess of $10,000 and recovery was sought for a violation of her constitutional rights. The court had jurisdiction to hear and determine the suit under section 1331(a).[16]

Although the defendants now expressly disavow any attack "based upon plaintiff's failure to allege facts sufficient to state a cause of action," [17] in view of the history of this case this branch of the motion also should be resolved and put to rest. First, to the extent that this attack is a renewal of the City's earlier motion to dismiss, it may properly be denied for failure to comply with Local General Rule 9(m).[18] But there are additional and weightier reasons for its denial.

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[15] *Id.* 516.

[16] It is not without interest to note that in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), which upheld a claim for damages based upon a violation of Fourth Amendment rights, jurisdiction was asserted under the very sections relied on by the plaintiff here. The Court upheld jurisdiction under section 1331(a), but noted that neither 28 U.S.C. § 1343(3) nor 28 U.S.C. §1343(4), combined with 42 U.S.C. § 193, would support jurisdiction over the damage claim. *See also* Greenya v. George Washington Univ., 512 F.2d 556, 562, n.13 (D.C. Cir. 1975).

[17] Municipal Defendants' Supplementary Memorandum at 5. We note, however, that the defendants' notice of motion does refer to Rule 12(b)(6), which governs motions for "failure to state a claim upon which relief can be granted."

[18] Rule 9(m) requires that a notice of motion for reargument be served within 10 days of the filing of the court's determination of the original motion. The City's "renewal" motion here followed a gap of almost three years.

Plaintiff's claim for back wages has been in the case from its very inception, and the three-judge court in its original disposition on March 12, 1973 "ordered that plaintiff be reinstated with back pay for the period of her involuntary leave of absence." On March 27, 1973, the municipal defendants and plaintiff stipulated "that the back pay award be stayed pending the final deposition [sic] of the appeal of the adjudicated decision." The recognition that a claim for back pay had been made and allowed, and the failure of defendants to raise their current contention until long after the adjudication upon the merits in plaintiff's favor, forecloses defendants' attack for failure to state a claim. If, as stated in *Bell* v. *Hood,* "the failure to state a proper cause of action calls for a judgment on the merits," then a litigant should not be permitted to raise such a failure after a determination on the merits. This view finds support in Rule 12(h)(2) of the Federal Rules of Civil Procedure, which provides that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings or at trial on the merits." The clear thrust of the Rule is that a failure to state a claim may be raised at any time *before* a disposition on the merits but not *after.* Any other construction would not only add to intolerable delay, but create uncertainty as to the validity of a final judgment on the merits.

Finally, at this post-judgment stage of this long-drawn litigation, to hold, assuming defendants are correct, that plaintiff has failed to state a claim for back wages would reward defendants for dilatoriness and penalize plaintiff. Upon argument the City defendants conceded that were this action dismissed and plaintiff now required to com-

mence anew an action in the state court for recovery of her unpaid back wages, the claim would be barred by the statute of limitations.

Accordingly, we hold that defendants have waived their objection that the complaint fails to state a cause of action for damages.[19] The plaintiff's motion for entry of judgment is granted.

Dated: New York, N. Y.
December 10, 1975

EDWARD WEINFELD
U.S.D.J.

FREDERICK P. BRYAN
U.S.D.J.

[19] *See* C. Albert Sauter Co. v. Richard S. Sauter Co., 368 F. Supp. 501, 511 (E.D. Pa. 1973). *Cf.* Smeed v. Carpenter, 274 F.2d 414, 418 (9th Cir. 1960); Munson Line v. Green, 6 F.R.D. 470, 475 (S.D.N.Y. 1947). By so holding we intimate no view as to how the damage issue would have been decided had it been timely raised. In that event, we would have expressly faced the question whether plaintiff would have been entitled to damages directly under the Fourteenth Amendment, which was the issue left unresolved in *Brault* v. *Town of Milton*. *See* n.13 *supra*. We decide only that it is not jurisdictional in nature, and therefore that the issue presented by our earlier award of damages is subject to waiver.

MULLIGAN, *C.J.* (concurring in the result):

I cannot agree with the majority that this court has jurisdiction under section 1331 to award damages for a violation of Fourteenth Amendment rights. Since municipalities are expressly excluded from section 1983 liability,[1] Congress could hardly have intended them to be included in a Fourteenth Amendment action predicated on section 1331, the general federal jurisdiction section. The legislative background of section 1331, which is discussed in *Lynch* v. *Household Finance Corp.*,[2] is hardly indicative of a congressional intention to create a jurisdictional base for actions against municipalities founded directly on the Constitution.

Unlike the Fourth Amendment, the Fourteenth contains an explicit provision (section 5) giving Congress the power to enact appropriate legislation. The predecessor of section 1983 (and its jurisdictional predicate, section 1343) was section 1 of the Civil Rights Act of 1871, which Congress expressly stated was enacted to enforce the provisions of the Fourteenth Amendment.[3] Thus section 1983 is the product of congressional action pursuant to section 5 of the Fourteenth Amendment. But in enacting section 1983, Congress rejected relief against municipalities.[4] Hence *Bivens* v. *Six Unknown Named Agents*,[5] a Fourth Amendment case, is distinguishable. In *Bivens* there also were "no special factors counselling hesitation in the absence of

[1] City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

[2] 405 U.S. 538, 546-48 (1972).

[3] District of Columbia v. Carter, 409 U.S. 418, 423 (1973).

[4] Monroe v. Pape, *supra*.

[5] 403 U.S. 388 (1971).

affirmative action by Congress," [6] and there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents." [7] In this case there is a special factor counselling hesitation, namely, the fiscal vulnerability of a sorely pressed municipality, and the explicit language of section 1983 limiting liability to "persons," which has been construed not to encompass municipalities.

I would hold instead that we have pendent jurisdiction here. The plaintiff does have a state cause of action to recover back wages following an improper dismissal.[8] The state and federal claims here arise out of a "common nucleus of operative fact" and it certainly is in the interest of judicial economy to dispose of the claims together.[9] The defendants argue that the claim has been raised too late by the plaintiffs, but they themselves did not raise the jurisdictional issue until this stage of the litigation.[10] As the majority opinion notes, the equities are entirely with the plaintiff; since the question of pendent jurisdiction is one within our discretion to entertain,[11] we should take account of the hardship and delay already suffered by the plaintiff here. The argument that pendent jurisdiction is foreclosed by res judicata because the plaintiff's state claims have already been litigated and dismissed

[6] *Id.* at 396.

[7] *Id.* at 397.

[8] New York Civil Service Law § 77.

[9] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[10] *See* 28 U.S.C. § 1653 (defective allegations of jurisdiction may be amended in the trial or appellate courts).

[11] United Mine Workers v. Gibbs, *supra*, 383 U.S. at 726.

in New York is specious, since it is clear that the New York dismissal [12] was for failure to exhaust administrative remedies. That would not bar a subsequent state action on the merits. Since we have already determined that section 72 of the New York Civil Service Act is unconstitutional, the claim for back wages should properly be determined here.

Dated: New York, N.Y.
December 10, 1975

WILLIAM H. MULLIGAN (per MDD)
U.S.C.J.

[12] 168 N.Y.L.J., Aug. 11, 1972, at 2.

Appendix "B"

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 72 Civ. 4536

MARIE SNEAD,

Plaintiff,

vs.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, *etc., et al.,*

Defendants.

JUDGMENT

The above-entitled and numbered cause coming on to be heard on the 19th day of June, 1975, pursuant to the Supreme Court of the United States having vacated the judgment and remanded the case to this Court for consideration of the question of mootness, and all parties hereto having appeared by counsel and the Court having heard the arguments of counsel and the memorandum of law submitted by the State Defendants and Plaintiff's memorandum in response thereto, and upon due consideration thereof, it appearing to the Court that Plaintiff should be granted the relief prayed for in her Complaint, it is therefore on this 10th day of December, 1975

Appendix "B"

ORDERED, ADJUDGED AND DECREED that Section 72 of the New York Civil Service Law is hereby declared unconstitutional and it is further

ORDERED, ADJUDGED AND DECREED that the Defendants are hereby enjoined from taking any action pursuant to Section 72 of the New York Civil Service Law and it is further

ORDERED, ADJUDGED AND DECREED that the Defendants are to expunge all references and documentation in Plaintiff's personnel file relative to Plaintiff having been declared mentally unfit pursuant to said Section 72 of the New York Civil Service Law and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover from the Defendant Department of Social Services of the City of New York and the Defendant Civil Service Commission of the City of New York the sum of $12,630.00, representing back pay with increments and legal interest thereon for the period of Plaintiff's involuntary leave of absence together with further interest thereon from the 10th day of December 1975 until paid and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff be awarded eleven (11) sick days and twenty (20) vacation days, representing benefits lost during the period of her involuntary leave of absence and it is further

Appendix "B"

ORDERED, ADJUDGED AND DECREED that the Defendants pay all costs of these proceedings to be taxed by the Clerk of this Court.

Dated: December 10, 1975.

/s/ WILLIAM H. MULLIGAN
William H. Mulligan
United States District Judge

/s/ EDWARD WEINFELD
Edward Weinfeld
United States District Judge

/s/ FREDERICK VAN PELT BRYAN
Frederick Van Pelt Bryan
United States District Judge

JUDGMENT ENTERED—12-17-75
RAYMOND F. BURGHARDT
Clerk

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By /s/ B. WASSERMAN
Deputy Clerk

Appendix "C"

§ 75. *Removal and other disciplinary action*

1. Removal or disciplinary action. A person described in paragraph (a) or paragraph (b) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department.

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writ-

ing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of sus-

pension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

4. Notwithstanding any other provisions of law, no removal or disciplinary proceeding shall be commenced more than five years after the occurrence of the alleged incompetency or misconduct complained of and described in the charges; provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court or appropriate jurisdiction, constitute a crime, L. 1958, c. 790, eff. April 1, 1959.